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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA
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9 Burton Colson,

10 Plaintiff,

11 vs.

12 Javad Maghami a/k/a Javad
13 Ghaemmaghani Marie Debernardi
14 Ghaemmaghani, Javad and Marie
15 Maghami d/b/a Scottsdale Lamborghini
and/or Scottsdale Motorsports;
16 Lamborghini of Scottsdale LLC, an
Arizona limited liability company; Motor
17 Sports Of Scottsdale, Inc., Motorsports of
Scottsdale No. 2, LLC, and Automobili
Lamborghini America, LLC, a Delaware
18 Corporation,

19 Defendants.

No. CV 08-2150-PHX-MHM

ORDER

20
21 Currently pending before the Court are Plaintiff's Motion for Partial Summary
22 Judgment (Dkt.#148), Automobili Lamborghini America, LLC's Motion for Summary
23 Judgment (Dkt.#145), and Plaintiff's Motion for a Continuance Pursuant to Rule 56(f)
24 (Dkt.#154). Having considered these motions and their accompanying papers and
25 determined that oral argument is unnecessary, the Court issues the following Order.

26 **I. Factual Background**

27 For the purposes of Colson's motion for partial summary judgment, the undisputed
28 facts are as follows: The parties agree that Motor Sports of Scottsdale, Inc., an Arizona

1 corporation, operated both a high-end used car dealership in Scottsdale and a new car
2 Lamborghini dealership in Scottsdale. (Dkt.#157 ¶ 1; Dkt. #151 ¶ 1) The Scottsdale
3 dealership has been known as Motor Sports of Scottsdale or Lamborghini of Scottsdale.
4 (Dkt.#156 at 4) Javad Maghami (Mr. Maghami) and Marie DeBernardi Maghami (Mrs.
5 Maghami) own all of the stock of Motor Sports of Scottsdale, Inc. (Dkt.#152 ¶ 1; Dkt.#156
6 at 4-7) The parties dispute whether two related entities that were formed by Mr. and Mrs.
7 Maghami, Lamborghini of Scottsdale, LLC and Motor Sports of Scottsdale No. 2, LLC, were
8 ever operational. (Dkt. #156 at 4-5)

9 As part of Motor Sports of Scottsdale's regular course of business, it accepts deposits
10 from customers for the purchase of automobiles, whether new or used. (Dkt.#157 ¶ 3;
11 Dkt.#151 ¶ 3) Motor Sports of Scottsdale obtained its Lamborghini franchise/dealership
12 agreement in approximately August of 2004, pursuant to a written Dealership Agreement.
13 (Dkt.#157 ¶ 5; Dkt.#151 ¶ 5)

14 Prior to September 24, 2007, Motor Sports of Scottsdale sold Barton Colson several
15 cars, including approximately five high-end used automobiles and new Lamborghini
16 automobiles. (Dkt. #157 ¶ 7; Dkt. #151 ¶ 7) On September 24, 2007, Barton Colson came
17 to the Motor Sports Scottsdale showroom. (Dkt.#157 ¶ 8; Dkt.#151 ¶ 8) Mr. Colson met
18 personally with Mr. Maghami. (Dkt.#147 ¶ 4; Dkt.#152 ¶ 4) They discussed a rare and
19 limited edition vehicle known as the Lamborghini Reventon (Dkt.#147 ¶ 5; Dkt.#152 ¶ 5).
20 Maghami told Colson that Lamborghini intended to create only 20 Reventons. (Dkt.#147
21 ¶ 6; Dkt.#152 ¶ 6) Mr. Colson explained to Mr. Maghami that he had seen a limited edition
22 Reventon Lamborghini at a Lamborghini trade show and was interested in purchasing one.
23 (Dkt.#157 ¶ 9; Dkt.#151 ¶ 9)¹ When Colson expressed interest in the Reventon, Maghami
24 stated that he may be able to get one for Colson. (Dkt.#147 ¶ 7; Dkt.#152 ¶ 7) Maghami
25

26 ¹ Although parts of paragraph 9 are disputed (namely, the fact that Mr. Colson was
27 a substantial car collector who, at the time of the taking of his deposition, had approximately
28 295-325 automobiles), the disputed portions of paragraph 9 are not relied upon in this Order.

1 explained that, to purchase a Reventon, Colson would need to immediately place a \$500,000
2 deposit to be considered to purchase the car. (Dkt.#147 ¶ 8; Dkt.#152 ¶ 8) Colson was also
3 told that he would need to submit an application for the Reventon and that if the application
4 was approved, he would need to submit additional funds. (Dkt.#147 ¶¶ 16, 17, 18; Dkt.#152
5 ¶¶ 16, 17, 18)² The application was submitted to Lamborghini. (Dkt.#147 ¶ 21; Dkt.#152
6 ¶ 21) On or about September 24, 2007, Colson wrote Lamborghini of Scottsdale a check
7 for \$500,000 as a deposit for the Reventon. The check was subsequently deposited into Bank
8 of America account number 004878100888. (Dkt.#147 ¶ 10; Dkt.#152 ¶ 10) “On the same
9 day, Colson signed an agreement with the Maghami [D]efendants for the purchase of a
10 Reventon.” (Dkt.#147 ¶ 11; Dkt.#152 ¶ 11)

11 While the preceding sentence is quoted verbatim from Plaintiff’s Statement of
12 Undisputed Facts in Support of Plaintiff’s Motion for Partial Summary Judgment (Dkt.#147
13 ¶ 11), it is not easy to determine the exact meaning of the “Maghami [D]efendants.”
14 Defendants partially admit this sentence in their Response (Dkt.#152 ¶ 11), adding an
15 unrelated qualification.³ Plaintiff did not define “Maghami [D]efendants” in its Statement
16 of Facts; however, Defendants state that the “Maghami Defendants” are “all Defendants
17 except Automobili Lamborghini America, LLC, a Delaware corporation” in their Response
18 to Plaintiff’s Statement of Undisputed Facts (Dkt.#152 at 1) Plaintiff did define the term
19 “Maghami [D]efendants” in its Motion for Summary Judgment (Dkt.#148 at 2) as “Javad
20 Maghami a/k/a Javad Ghaemmaghmi and Marie DeBernardi Maghami a/k/a/ Marie

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22 ² Although the parties dispute whether it was disclosed that the additional funds
23 would be approximately six hundred thousand euros at this time or whether the full price had
24 not yet been determined, the timing of this disclosure does not appear dispositive to the
Court’s analysis.

25 ³ The only qualification that the Maghami defendants add to this statement is to add
26 that the Purchase Order is a “stand by” Order which makes it subject to Lamborghini’s
27 approval to sell Motor Sports of Scottsdale one of the Reventons. (Dkt.#152 ¶ 11) However,
28 this statement does not dispute the underlying statement that “[o]n the same day, Colson
signed an agreement with the Maghami [D]efendants for the purchase of a Reventon.”
(Dkt.#147 ¶ 11; Dkt.#152 ¶ 11)

1 DeBernardi Ghaemmaghami, Javad and Marie Maghami d/b/a Scottsdale Lamborghini
2 and/or Scottsdale Motorsports, Lamborghini of Scottsdale LLC, and Motor Sports of
3 Scottsdale, Inc.” Curiously, Motor Sports of Scottsdale No. 2, LLC does not appear to be
4 included on this list. However, Plaintiff appears to accept Defendants’ definition in
5 Plaintiff’s Reply, defining the “Maghami [D]efendants” to include “Javad Maghami a/k/a
6 Javad Ghaemmaghami; Marie DeBernardi Maghami a/k/a/ Marie DeBernardi
7 Ghaemmaghami; Javad and Marie Maghami d/b/a Scottsdale Lamborghini and/or Scottsdale
8 Motorsports; Lamborghini of Scottsdale LLC; Motor Sports of Scottsdale, Inc.; and
9 Motorsports of Scottsdale No. 2, LLC.” (Dkt.#158 at 1-2) For the purposes of this Order,
10 the term “Maghami Defendants” will hereafter be defined to include all Defendants except
11 for Automobili Lamborghini America, LLC, a Delaware Corporation unless otherwise
12 specified.

13 Many subsequent events appear to be disputed; however, it is undisputed that on or
14 about January 16, 2008, Colson wired \$881,000 into Wells Fargo Account Number
15 402001823, held by defendant Motor Sports of Scottsdale Inc. (Dkt.#147 ¶ 29; Dkt.#152 ¶
16 29) Colson received confirmation from Wells Fargo Bank that the wire transfer was
17 complete. (Dkt.#147 ¶ 30; Dkt.#152 ¶ 30) In response to Maghami’s statement that Colson
18 is “ready to give a \$500,000 deposit,” Lamborghini’s representative stated: “I cannot
19 guarantee you any slot. It would be interesting to have the contacts of the customer in order
20 to keep updated the waiting list in case some customer drops out.” (Dkt.#147 ¶ 32; Dkt.#152
21 ¶ 32)

22 The Maghami Defendants admit that Colson was never advised that there were no cars
23 available (Dkt. #152 ¶ 33); however, they claim that Colson was aware that there was a
24 waiting list and never demanded the return of his money. (Id.) The Maghami Defendants
25 further assert that Mr. Maghami “at all times believed that Mr. Frigerio would make a
26 Reventon available to Colson,” and therefore, he saw no reason to return the deposit at this
27 time. (Id.) However, Colson asserts that in his deposition, Mr. Maghami claimed that he did
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1 not know there was a waiting list and admitted that he never told Colson about any such list.⁴
2 (Dkt. # 156 ¶ 33) Because of these discrepancies, the Court will treat this matter as a
3 disputed issue of fact.

4 In August 2008, Colson personally visited a Lamborghini assembling factory in Italy
5 to discuss the delivery date for the Reventon he purchased. (Dkt.#147 ¶ 38; Dkt.#152 ¶ 38)
6 At the same time, Colson's brother Brad Colson began contacting the Maghami defendants
7 to discuss Colson's Reventon. (Dkt.#147 ¶ 40; Dkt.#152 ¶ 40)

8 In September 2008, Colson contacted Pietro Frigerio, the Chief Operating Officer of
9 defendant Automobili Lamborghini America, LLC ("Lamborghini America"), to inquire
10 about the status of Reventon Number 10. (Dkt.#147 ¶ 42; Dkt.#152 ¶ 42) Frigerio informed
11 Colson that Colson would never receive Reventon Number 10 or any other Reventon because
12 they had all been sold. (Dkt.#147 ¶ 44; Dkt.#152 ¶ 44) Colson never received Reventon
13 Number 10 or any other Reventon. The Maghami defendants also admit that Colson never
14 received the Reventon he purchased. (Dkt.#147 ¶ 44; Dkt.#152 ¶ 44)

16 ⁴ Based on this and several other discrepancies between Mr. Maghami's Affidavit in
17 support of the Maghami Defendants' Opposition to Summary Judgment, and his prior
18 deposition testimony, Colson moves to strike the Maghami Affidavit, the Maghami
19 Statement of Facts Response, all parts of the Maghami Defendants' Response that rely on
20 these two documents, and asks that all portions of these documents be stricken from the
21 record and not considered. (Dkt. #156 at 20) While "the general rule . . . is that a party
22 cannot create an issue of fact by an affidavit contradicting his prior deposition testimony,"
23 Kennedy v. Allied Mut. Ins. Co., 952 F.2d 262, 266 (9th Cir. 1991), the Ninth Circuit has
24 also ruled that a district court must make a factual determination that an affidavit
25 contradicting prior deposition testimony was actually a "sham" before striking such
26 testimony because of the possibility that such discrepancies are an honest mistake, or a result
27 of newly discovered evidence. Id. at 266-67. The Court is unwilling to find that Mr.
28 Maghami's affidavit is wholly a "sham," given that the Maghami Defendants never had the
opportunity to respond to this argument in the briefing; therefore, the request to strike will
be denied. The discrepancies between the affidavit and the deposition testimony obviously
impugn Mr. Maghami's credibility; however, the Court is not permitted to make credibility
determinations at summary judgment. Slumier v. Verity, Inc., 606 F.3d 584, 587 (9th Cir.
2010) ("Credibility determinations, the weighing of the evidence, and the drawing of
legitimate inferences from the facts are jury functions, not those of a judge [when] ruling on
a motion for summary judgment.") (internal quotations and citations omitted).

Colson filed a complaint alleging breach of contract, breach of the covenant of good faith and fair dealing, unjust enrichment, negligent or intentional misrepresentation, fraudulent concealment, fraud, and aiding and abetting against a number of defendants, including Motor Sports of Scottsdale, Mr. and Mrs. Maghami, Lamborghini of Scottsdale, Motor Sports 2 of Scottsdale, and Automobili Lamborghini America, LLC. (Dkt.#123) Colson subsequently moved for partial summary judgment. (Dkt.#148) Automobili Lamborghini of America, LLC cross-moved for summary judgment. (Dkt.#145)

II. Motion for Summary Judgment Standard

A motion for summary judgment may be granted only if the evidence shows “that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(c). A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the differing versions of the truth. S.E.C. v. Seaboard Corp., 677 F.2d 1301, 1305-06 (9th Cir. 1982). To defeat the motion, the non-moving party must show that there are genuine factual issues “that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). Summary judgment is appropriate against a party who “fails to make a showing sufficient to establish the existence of an element essential to that party’s case, and on which that party will bear the burden of proof at trial.” Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

III. Colson’s Motion for Partial Summary Judgment

Colson moves for partial summary judgment on Counts 1-5 of his amended Complaint. (Dkt.#148 at 2). These Counts include: (1) Breach of Contract, (2) Breach of the Covenant of Good Faith and Fair Dealing, (3) Unjust Enrichment, (4) Negligent or Intentional Misrepresentation, and (5) Fraudulent Concealment. (Dkt.#123) Colson seeks judgment on these counts against defendants Javad Maghami, Marie Maghami, Motor Sports of Scottsdale, Inc., Lamborghini of Scottsdale LLC and Motor Sports of Scottsdale No. 2, LLC (collectively, the “Maghami Defendants”). In their Response, the Maghami Defendants concede the liability of Motor Sports of Scottsdale regarding the two contract-related claims,

1 the Breach of Contract claim and the Unjust Enrichment claim. (Dkt.#149 at 2) Given this
2 concession, judgment will be entered against Motor Sports of Scottsdale for both these
3 claims. The rest of this section will analyze whether summary judgement may be granted
4 against the remaining Maghami Defendants for any of the remaining five claims.

5 **A. Breach of Contract Liability for Remaining Maghami Defendants**

6 Colson initially argued that “the Maghami defendants” executed the Contract,
7 breached the Contract, were paid for the Reventon, but never provided the Reventon.
8 (Dkt.#148 at 6-7).

9 The Maghami Defendants’ Response argues that there is no undisputed factual basis
10 to hold any of the other defendants (besides Motor Sports of Scottsdale) liable for breach of
11 contract. (Dkt.#149 at 8). The Maghami Defendants’ Response points out that Lamborghini
12 of Scottsdale’s only tie to the contract was the fact that Colson’s check was made payable
13 to it rather than to Motor Sports of Scottsdale, and that all money paid by Mr. Colson was
14 ultimately deposited or wired into the Motor Sports of Scottsdale account. (Id. at 9)

15 Colson’s Reply focuses on whether Lamborghini of Scottsdale is liable for the breach
16 of contract claim (and thus appears to concede that summary judgment against the other
17 Maghami Defendants [except Motor Sports of Scottsdale] is inappropriate by failing to
18 marshal undisputed facts that would suggest that the other individual defendants are also
19 personally liable for breach of contract).⁵ (Dkt.#158 at 7-8) Colson asserted that
20 “Lamborghini of Scottsdale . . .agreed to sell Plaintiff the Reventon,” and that it . . . cashed
21 [P]laintiff’s \$500,000 check, which was a deposit for the Reventon” in his Motion for
22 Summary Judgment. (Dkt.#148 at 6-7) Regarding Lamborghini of Scottsdale, the Reply
23 alleges that it is undisputed that this entity operated the dealership and retained Colson’s
24 funds. However, merely accepting funds would not be a sufficient factual basis for judgment
25 that Lamborghini of Scottsdale breached its contract with Colson. To prevail on a breach of

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27 ⁵ Colson’s Reply does raise a number of derivative liability theories (such as alter ego
28 liability) that are addressed below in section F.; this section will only address *direct* liability
for the breach of contract claim.

1 contract claim, it is axiomatic that a party must first prove that a contract existed. Graham
2 v. Asbury, 112 Ariz. 184, 185, 540 P.2d 656, 657 (1975) (“To bring an action for the breach
3 of the contract, the plaintiff has the burden of proving the existence of the contract, its breach
4 and the resulting damages.”). Defendants dispute whether Lamborghini of Scottsdale had
5 a valid contract with Colson. (Dkt.#149 at 8-9) Although Defendants concede that the pre-
6 printed Purchase Order that formed the basis of the relationship of the parties was on a form
7 entitled “Lamborghini Scottsdale,” Defendants claim that “[o]nly Motor Sports of Scottsdale
8 was the authorized Lamborghini new car dealer and the only entity that had the legal ability
9 to contract for the purchase of the Reventon and secure the same form Lamborghini.”
10 (Dkt.#149 at 8) Because the existence of a contract between Lamborghini of Scottsdale and
11 Colson is disputed, the Court cannot grant summary judgment against Lamborghini of
12 Scottsdale on this claim. Accordingly, Colson’s Motion for Partial Summary Judgment on
13 his contract claim is granted only against Motor Sports of Scottsdale.

14 **B. Unjust Enrichment for the Remaining Maghami Defendants**

15 Colson’s Motion for Summary Judgment asserts that all of the Maghami Defendants
16 are liable for unjust enrichment. (Dkt.#148 at 7-8) While Motor Sports of Scottsdale accepts
17 liability for unjust enrichment, the remaining Maghami Defendants dispute liability on this
18 claim. (Dkt. #149 at 9) Colson’s Reply points out undisputed facts to support this claim only
19 with respect to Lamborghini of Scottsdale. To demonstrate a claim for unjust enrichment,
20 Plaintiff must show that defendant has been enriched, Plaintiff has been impoverished, there
21 is a connection between the enrichment and the impoverishment, there is an absence of
22 justification for the impoverishment, and that Plaintiff lacks a legal remedy. Trustmark Ins.
23 Co. v. Bank One, Ariz., 202 Ariz. 535, 541, 48 P.3d 485, 491 (App. 2002). It appears
24 undisputed that (1) Colson paid Lamborghini of Scottsdale at least \$500,000 for the purchase
25 of a car (an impoverishment), (2) Lamborghini of Scottsdale retained the money and did not
26 return it to Colson (an enrichment), and (c) Lamborghini of Scottsdale did not deliver a car
27 to Colson, through no fault of Colson (an absence of justification for the enrichment and
28 impoverishment). (Dkt.#147 ¶¶ 10, 29, 44; Dkt.#152 ¶¶ 10, 29, 44; Dkt.#156 ¶¶ 1-3;

1 Dkt.#157 ¶ 26) These undisputed facts make summary judgment against Lamborghini of
2 Scottsdale appropriate on Colson’s unjust enrichment claim.

3 The Maghami Defendants assert that a number of facts are disputed notwithstanding
4 their earlier admissions regarding these facts in their answer. However, “[u]nder federal law,
5 stipulations and admissions in the pleadings are generally binding on the parties and the
6 Court.” American Title Ins. Co. v. Lacelaw Corp., 861 F.2d 224, 226 (9th Cir. 1988). The
7 underlying purpose in requiring an answer to a pleading is because admissions in the
8 pleadings “have the effect of withdrawing a fact from issue and dispensing wholly with the
9 need for proof of the fact.” Id. Thus, “[f]actual assertions in the pleadings and pretrial
10 orders, unless amended, are considered judicial admissions conclusively binding on the party
11 who made them.” Id. Because of this rule, Lamborghini of Scottsdale’s admission that it
12 “own[ed] and operate[d] the dealership,”(Dkt.# 130 ¶ 15), in its answer will be binding,
13 notwithstanding its attempt to dispute this fact now. As explained above, Colson’s Reply
14 focused on liability only for Lamborghini of Scottsdale on this claim and did not present a
15 factual basis for holding Mr. and Mrs. Maghami or Motor Sports 2 of Scottsdale directly
16 liable for the breach of good faith and fair dealing.

17 Thus, Colson is granted partial summary judgment against both Motor Sports of
18 Scottsdale and Lamborghini of Scottsdale on his unjust enrichment claim; however, there do
19 not appear to be sufficient undisputed facts to support summary judgment against the
20 remaining Maghami Defendants.

21 **C. Liability for Breach of Covenant of Good Faith and Fair Dealing**

22 Colson seeks summary judgment against all of the Maghami Defendants (including
23 Motor Sports of Scottsdale) on its Breach of Covenant of Good Faith and Fair Dealing claim.
24 Arizona recognizes an implied covenant of good faith and fair dealing in every contract.
25 Rawlings v. Apodaca, 151 Ariz. 149, 153, 726 P.2d 596, 600 (1986). In essence, this
26 covenant means that “neither party will act to impair the rights of the other to receive the
27 benefits which flow from their agreement or contractual relationship.” Id., 151 Ariz. at 153-
28 54, 726 P.2d 600-601. Colson asserts that “[b]y failing to provide plaintiff with a Reventon

1 that plaintiff had paid for, by failing to secure a Reventon as promised, and by failing to
2 inform plaintiff about the status of Reventons [or] his place on any waiting list, the Maghami
3 [D]efendants are liable for the breach of the implied covenant of good faith and fair dealing.”
4 (Dkt.#148 at 7)

5 However, as the Maghami Defendants point out in their Response, there are a
6 multitude of disputed factual questions surrounding this issue. (Dkt.#149 at 9) Mr. Maghami
7 asserts that he did everything he could do to secure the Reventon; he also asserts that he
8 believed that a Reventon would become available later, after the initial Reventon he had
9 hoped to secure Colson fell through. (Dkt.#149 at 10) The Maghami Defendants also assert
10 that it is a customary business practice to place customer deposits in the dealership’s general
11 fund, and that they could not have known that the luxury car business would face as steep a
12 decline as it did at the end of 2008. (Dkt.#149 at 9-11)

13 Colson disputes these facts and asserts that the Maghami “deliberately refused” to
14 communicate the fact that the dealership “would not be immediately receiving a car,” and
15 instead kept his money and avoided his inquiries for eight months. (Dkt. #158 at 8) Almost
16 every fact relating to the period after Colson submitted his deposit until he ultimately
17 discovered that he would not be receiving a Reventon several months later is hotly disputed,
18 as is the motivation behind the Maghami’s actions (such as whether they were motivated by
19 good faith or bad faith). (Dkt.#147 ¶¶ 33-37; Dkt.#151 ¶¶ 33-37) Because these disputed
20 facts are crucial to the determination of whether the Maghami Defendants breached the duty
21 of good faith and fair dealing, it is inappropriate for the Court to grant summary judgment
22 on this claim. See National Basketball Ass’n v. SDC Basketball Club, Inc., 815 F.2d 562,
23 569-70 (9th Cir. 1987) (explaining that questions of fact as to whether duty of good faith and
24 fair dealing was breached, and if so, who breached the duty, precluded summary judgment).
25 Accordingly, Colson’s Motion for Partial Summary Judgment on his breach of good faith and
26 fair dealing claim is denied.

27 **D. Negligent or Intentional Misrepresentation & Fraudulent Concealment**
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1 Colson also moved for summary judgment regarding his misrepresentation and
2 fraudulent concealment claims against all of the Maghami Defendants. (Dkt.#148 at 8) A
3 party is liable for a negligent misrepresentation when it supplies false information for the
4 guidance of others in a business transaction and fails to use reasonable care in supplying the
5 information. St. Joseph's Hosp. & Med. Ctr. v. Reserve Life Ins. Co., 154 Ariz. 307, 312
6 (1987). A party is liable for fraudulent concealment for "intentionally prevent[ing] [an]other
7 from acquiring material information." Wells Fargo Bank v. Arizona Laborers, Teamsters,
8 and Cement Masons Local No. 395 Defined Contribution Pension Trust Fund, 201 Ariz. 474,
9 496, 38 P.3d 12, 34 (2002); see also Fomento v. Encanto Business Park, 154 Ariz. 495, 501,
10 744 P.2d 22, 28 (App. 1987) ("A representation stating the truth so far as it goes but which
11 the maker knows or believes to be materially misleading because of his failure to state
12 additional or qualifying information is a fraudulent misrepresentation.") (internal quotations
13 and citations omitted).

14 Colson argues that the Maghami Defendants are liable for misrepresentation and
15 fraudulent concealment because they misled him regarding the purchase of the Reventon by
16 telling him that they had access to a Reventon when then were being told otherwise by
17 Lamborghini. Colson also argues that for eight months after he deposited an additional
18 \$881,000, the Maghami Defendants repeatedly failed to notify him (Colson) that they had
19 no Reventon to deliver. Colson points to ¶¶ 28, 31-33, 36-37, 39, 41, 47 of his Statement
20 of Facts (Dkt.# 147); however, these facts appear to be hotly disputed. (Dkt.#156) The
21 Maghami Defendants assert that the reason they did not tell Colson that no Reventon was
22 available was based on their good faith but mistaken belief that another Reventon would
23 become available. (Dkt.#149 at 13-14) The Maghami Defendants further assert that Mr.
24 Frigerio continually assured Mr. Maghami that a Reventon would ultimately be made
25 available to Colson if he was patient. Because these facts are material and disputed,
26 summary judgment on this issue is inappropriate.

27 The Maghami Defendants also assert that this claim would be barred by the economic
28 loss rule. The economic loss rule limits a "contracting party to contractual remedies for the

1 recovery of economic losses unaccompanied by physical injury to person or other property."
2 Flagstaff Affordable Housing Ltd. P'ship v. Design Alliance, Inc., 223 P.3d 664, 667 (Ariz.
3 2010). Since Motor Sports of Scottsdale is a contracting party, Colson is limited to
4 contractual remedies for the recovery of economic losses against Motor Sports of Scottsdale
5 since there does not appear to be any allegation of physical injury to a person or any other
6 property. Thus, the economic loss rule would bar Colson from recovering for
7 misrepresentation and fraudulent concealment against Motor Sports of Scottsdale. However,
8 since none of the other Maghami Defendants have been deemed contracting parties, the
9 economic loss rule would not bar Colson from recovering against them for other torts.
10 Because they do not appear to have been parties to the contract, Mr. and Mrs. Maghami could
11 still theoretically be liable for misrepresentation and fraudulent concealment. It should be
12 noted that Colson may ultimately have to elect between the tort and contractual theories of
13 liability at trial.⁶ Accordingly, Colson's motion for partial summary judgment on these
14 claims against Motor Sports of Scottsdale is denied. Colson's motion for partial summary
15 judgment on Negligent Misrepresentation and Fraudulent concealment against the remaining
16 Maghami Defendants is denied based on disputed issues of material fact.

17 **F. Alter Ego Liability**

18 After Motor Sports of Scottsdale conceded that it was liable for breach of contract and
19 unjust enrichment in its Response to Colson's motion for summary judgment, Colson
20 asserted in his Reply that the Maghami Defendants were the alter egos of Mr. and Mrs.
21 Maghami. Because of this, Colson asserts that justice requires that Mr. and Mr. Maghami
22 be held personally liable (although he does not specify for which causes of action,
23 specifically). Colson asserts that there was a unity of interest in Mr. and Mrs. Maghami and
24 their businesses and that failing to hold Mr. and Mrs. Maghami personally liable would result
25 in injustice. (Dkt.#158 at 5-7) While it is true that theoretically, Mr. and Mrs. Maghami

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27 ⁶ The parties should be on notice that the Court may direct supplemental briefing on
28 the appropriate timing and procedure for this election (and whether it is required) at the
pretrial conference.

1 could be personally liable for their own tortious acts,⁷ the fact that this argument was not
2 raised until the reply means that the Maghami Defendants were not given a fair opportunity
3 to controvert these purportedly undisputed facts. Cutrona v. Sun Health Corp., 2008 WL
4 4446710 at *18 (D. Ariz. 2008) (“[A]rguments raised for the first time in a reply are
5 generally not considered by the Court, because to do so unfairly deprives the opposing party
6 of the opportunity to meaningfully respond.”). The Court is therefore unable to grant
7 summary judgment on this theory.

8 **G. Summary**

9 In summary, judgment is granted against Motor Sports of Scottsdale for Colson’s
10 breach of contract and unjust enrichment claims. Judgment is also granted against
11 Lamborghini of Scottsdale for Colson’s unjust enrichment claim, but denied as to Mr. and
12 Mrs. Maghami and Motor Sports of Scottsdale No. 2, LLC. Judgment is denied on the
13 breach of good faith and fair dealing claim; this claim will proceed against all of the
14 Maghami Defendants. Also, Colson’s claims for Misrepresentation and Fraudulent
15 Concealment will proceed against all of the Maghami Defendants except for Motor Sports
16 of Scottsdale.

17 **IV. Automobili Lamborghini’s Motion for Summary Judgment**

18 Defendant Automobili Lamborghini America, LLC, (“ALA”) seeks summary
19 judgment on all of Colson’s claims in his First Amended Complaint. (Dkt.#145) ALA
20 asserts that the factual record is clear with respect to ALA’s lack of involvement with Motor
21 Sports’ fraud. (Dkt. #145 at 3) It also asserts that “neither ALA nor any Lamborghini
22 company knew of Motorsports’ theft or participated in the theft in any manner” and that “no
23 Lamborghini company ever received so much as one penny of Colson’s deposit.” (Id.)

25 ⁷ See, e.g., Maryl Nutraceuticals, Inc. v. Improvita Health Prods., 663 F. Supp. 2d
26 841, 847 (D. Ariz. 2009) (explaining that “a director or officer of a corporation is
27 individually liable for fraudulent acts or false representations of his own ... even though his
28 action in such respect may be in furtherance of the corporate business”) (quoting Albers v.
Edelson Technology Partners L.P., 201 Ariz. 47, 52, 31 P.3d 821 (App. 2001)).

1 Colson set forth three theories of liability for ALA in his Amended Complaint: (1) that
2 ALA aided and abetted Motor Sports in committing the fraud, (2) that ALA breached a duty
3 to warn Colson, and (3) that Motor Sports was an agent of ALA. (Dkt. #123)

4 ALA contends that it is entitled to summary judgment because (1) there is no factual
5 support for Colson's assertion that ALA aided and abetted Motor Sports' fraud; (2) Colson
6 cannot proceed against ALA on a "failure to warn" theory because no such independent tort
7 is recognized in Arizona, and no suggestion that ALA had a relationship with Colson
8 sufficient to give rise to any duty towards him; (3) Motor Sports was not an agent of any
9 Lamborghini company, and thus ALA cannot be vicariously liable for Motor Sports'
10 conduct; and (4) ALA cannot be liable because it was not a franchisor of Motor Sports at the
11 time of the alleged fraud (at that time, the Lamborghini Franchisor was an Italian company,
12 Automobili Lamborghini, S.p.A. ("ALSPA")). (Dkt.#145) Each argument, along with
13 Colson's response, is addressed below.

14 **A. Aiding and Abetting Liability**

15 ALA contends that there is no factual support for the notion that ALA "aided and
16 abetted" the fraud perpetrated by Motor Sports because there is no evidence that ALA knew
17 that Maghami intended to defraud Colson or that ALA substantially assisted Motor Sports'
18 fraud. (Dkt.#145 at 8)

19 Colson responds by asserting that the Maghami Defendants defrauded him and that
20 genuine issues of fact remain as to whether ALA knew that the Maghami Defendants
21 committed torts. (Dkt. #154 at 13-14) He also argues that ALA substantially assisted the
22 Maghami Defendants in the commission of torts by ignoring Colson's questions about the
23 Reventon until after the Maghami Defendants had already spent Colson's money. (Dkt.#154
24 at 16)

25 To succeed on a claim for aiding and abetting a fraud, Plaintiff must demonstrate that
26 a Defendant had knowledge of a fraudulent scheme and that the Defendant provided
27 substantial assistance which was the cause of the Plaintiff's damages. Dawson v.
28 Withycombe, 216 Ariz. 84, 102 (App. 2007) 216 Ariz. at 102 (aiding and abetting claim

1 failed where there was no evidence of knowledge of a fraudulent scheme); Sec. Title Agency,
2 Inc. v. Pope, 219 Ariz. 480, 491-92 (App. 2008) (aiding and abetting claim requires causal
3 connection between defendant's assistance and tortfeasor's commission of tort). While
4 Colson is correct that a Plaintiff need not prove that the defendant had actual knowledge of
5 all of the details of the alleged fraud, a Plaintiff must still prove that the Defendant had actual
6 knowledge that a fraud either "had been" or "would in fact" be committed. Dawson, 216
7 Ariz. at 103.

8 There does not appear to be any evidence from which a reasonable jury could find that
9 ALA had actual knowledge of the fraud. Drawing all factual inferences in favor of Colson,
10 the most that a jury could infer was that ALA knew that the Maghami Defendants continued
11 to hold Colson's deposits while they attempted to locate a Reventon for him. This would be
12 insufficient to support a finding of liability for aiding and abetting, given the common
13 practice among dealers to hold onto customer deposits while attempting to locate a vehicle
14 for a customer. Even assuming that ALA had information about "suspicious activity," this
15 would not be sufficient for a finding of scienter. Stern v. Charles Schwab & Co., 2009 WL
16 3352408 at *7, No. CV 09-1229 (D. Ariz. October 16, 2009) (explaining "suspicion is not
17 enough. The aiding and abetting defendant must be aware of the fraud."). For similar
18 reasons, Colson's attempt to assert that ALA "substantially assisted" the Maghami
19 Defendants in committing the fraud fails because a Plaintiff must demonstrate that the
20 Defendant *knew* it was assisting in the commission of a tort in order to be liable for
21 substantially assisting a fraud. Colson has failed to identify any evidence that would support
22 a finding of actual knowledge. Even assuming that ALA (1) allowed Motor Sports to
23 operate as a dealer, (2) failed to disclose to Colson that Lamborghini had threatened to
24 terminate the dealership for breaching the Dealership Agreement, (3) failed to disclose to
25 Colson that the Reventon was sold out, and (4) ignored Plaintiff's telephone calls, none of
26 these facts could support a finding of actual knowledge of the Maghami Defendants' fraud.
27 For this reason, the Court will grant summary judgment in favor of ALA on Colson's aiding
28 and abetting claim.

1 **B. Failure to Warn**

2 ALA also argues that it is entitled to summary judgment on Count Twelve of Colson's
3 Amended Complaint ("failure to warn") because Arizona does not recognize an independent
4 tort of "failure to warn." (Dkt.#145 at 10) Because of this, ALA asserts that Colson must
5 establish that ALA owed him some independent duty from which a "duty to warn could arise.
6 (Id.) ALA further asserts that there is no evidence to support the existence of any such
7 independent duty. (Id.)

8 According to the Arizona Court of Appeals, "[t]here is no separate tort named 'failure
9 to warn.' Where liability is incurred by reason of a 'failure to warn' it is because there is
10 found present a duty to prevent harm to the individual who is injured." McGeorge v. City
11 of Phoenix, 117 Ariz. 272, 277-78, 572 P.2d 100, 105-106 (App. 1977). Colson cites two
12 cases that mention "failure to warn;" however, these cases stand merely for the proposition
13 that failure to warn may arise out of an already existing independent duty. (Dkt.#154 at 12-
14 13) (citing Martinez v. State, 177 Ariz. 270, 272 (App. 1993) and Robertson v. Sixpence Ins.
15 of Am., 163 Ariz. 539, 541 (App. 1990)). Colson fails to address McGeorge's clear
16 statement that no such tort exists in Arizona. (Dkt.#154 at 12-12)

17 Alternatively, Colson argues that ALA owed to Colson a duty to supervise Motor
18 Sports' activities, that this duty gave rise to a "duty to warn," and that ALA breached the
19 "duty to warn" by failing to warn Colson that the Maghami Defendants were going to steal
20 his money. (Dkt.#154 at 13) However, Colson does not cite any authority that would
21 support that a franchisor has a duty to supervise a franchisee. Colson relies on Dejonghe v.
22 E.F. Hutton, 171 Ariz. 341 (App. 1991); however, Dejonghe appears inapplicable because
23 it concerned an employer-employee relationship, not a franchisor-franchisee relationship.
24 As ALA points out, "long-standing authority explicitly rejects the notion that a franchisor has
25 a duty to supervise its franchisees." See, e.g., Freedman v. Tenn. Dev. Corp., 1993 U.S. Dist.
26 LEXIS 11021, No. 91-475, at *44-45 (D. Del. Aug. 3, 1993) ("no duty exists in law requiring
27 a franchisor to supervise in [franchisee's] financial dealings with third parties"); Cullen v.
28 BMW of North America, Inc., 691 F.2d 1097, 1101 (2d Cir. 1982) (franchisor not liable for

1 negligent failure to “police the methods or operation of [its] independent franchisee . . .
2 because of its precarious financial condition”).

3 Moreover, even assuming arguendo that there was a duty to supervise, Colson fails
4 to provide any support for his contention that a duty to supervise could provide the basis for
5 a “failure to warn” under Arizona law. (Dkt.#154 at 13) The only case he cites, Beneficial
6 Commercial Corp. v. Murray Glick Datsun, Inc., 601 F. Supp. 770 (S.D.N.Y. 1985), was
7 decided under New York law where “failure to warn” is an independent tort. It is thus
8 inapplicable here.

9 Finally, Colson’s argument that a jury could find that ALA had reason to suspect that
10 the Maghami Defendants were going to steal Colson’s money (and therefore should have
11 warned him) is farfetched. Even assuming (1) that ALA knew that the Maghami Defendants
12 had a history of missing payments and misrepresenting financial matters, (2) that ALA
13 terminated the Maghami Defendants’ dealership as a result of these issues, and (3) that ALA
14 knew that Colson paid for the Reventon, these facts would not support a finding that ALA
15 should somehow have known that the Maghami Defendants would attempt to steal Colson’s
16 money and that ALA therefore had a duty to warn Colson of this possible contingency. Quite
17 simply, “[t]he fact that a franchisor may know that one of its franchisees is having financial
18 difficulties or may not be accurately disclosing its financial data does not mean that a
19 franchisor knows that a franchisee is about to steal a customer deposit,” as ALA points out.
20 (Dkt.#160 at 7-8) Thus, drawing all factual inferences in favor of Colson, these facts could
21 not support a finding in Colson’s favor.

22 Given that Arizona does not recognize an independent tort of “failure to warn,” and
23 given that Colson has not provided any basis from which an independent duty might have
24 arisen to create a duty to warn, ALA is hereby granted summary judgment on Count Twelve
25 of Colson’s Amended Complaint. (Dkt.#123)

26 **C. Vicarious Liability/ Agency Theory**

27 The sole basis for Colson’s assertion of liability against ALA on Counts One through
28 Six of the Amended Complaint (Dkt.#123) is that “at all times relevant to Colson’s claims,

1 [the Maghamis] were acting as agents of, and on behalf of, Lamborghini America.”
2 (Dkt.#123 ¶ 10).⁸ ALA seeks summary judgment that it cannot be liable for these counts
3 because it did not have an agency relationship with Motor Sports of Scottsdale. (Dkt.#145
4 at 12)

5 Under Arizona law, there are four ways an agency relationship may be created: (1)
6 by “express agency,” where a principal gives express oral or written delegation of power to
7 the agent; (2) “agency by implication,” where a principal’s intention to create an agency is
8 inferred by the words or conduct of the parties; (3) “agency by ratification,” where the
9 principal subsequently affirms the agent’s conduct or accepts the benefits of the agent’s
10 conduct; and (4) “apparent agency,” where the conduct of the principal would cause a
11 reasonable person to infer the existence of an agency relationship and rely upon such
12 inference. State Farm Mut. Auto. Ins. Co. v. Mendoza, 2006 WL 44376 at *17 (D. Ariz.
13 2006). Each potential method is analyzed below.

14 **1. Express Agency**

15 ALA points to the Lamborghini Dealer Agreement as evidence that there was no
16 express agency relationship between it and Motor Sports. (Dkt.#145 at 13) Article 3(2) of
17 this Agreement states that the dealer is “an independent entrepreneur” who is not authorized
18 as an agent to act on behalf of, or bind, Lamborghini. (Dkt.#146 ¶ 7) Though Colson
19 purports to dispute ¶ 7 in his Controverting Statement of Facts (Dkt.#153 ¶ 7), his assertion
20 that “Lamborghini dealers were not only authorized to act on Lamborghini’s behalf, but were
21 required to take actions as representatives of Lamborghini,” (Id.), is a legal conclusion that
22 does not create a dispute of material fact. While Colson cites to a number of paragraphs of
23 his Controverting Statement of Facts (Dkt.#153 ¶ 7, citing ¶¶ 57-58, 61, 66, 70, 93, 97), none
24 of these paragraphs challenge the authenticity of the Dealer Agreement or the accuracy of
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26
27 ⁸ Apparently, Colson’s counsel has stipulated that Colson is not proceeding against
28 ALA on an agency theory for Counts Eight through Ten. (Dkt.#145 at 12 n.2) Count Eleven
has been resolved.

1 the excerpt cited above. Colson has failed to point to any evidentiary basis to support a
2 finding that an “express agency” existed between ALA and Motor Sports.

3 **2. Agency by Implication**

4 ALA argues that the record lacks any evidence by which it can be inferred that any
5 Lamborghini company intended to create an agency relationship between itself and Motor
6 Sports. (Dkt. #145 at 13) ALA points out that during Colson’s deposition, he explicitly
7 admitted that nobody from ALSPA or ALA ever represented to him that Motorsports was an
8 agent for purposes of selling the Reventon. (Id.)

9 Colson responds by suggesting that a general agency can be implied because the
10 evidence in the record suggests that Lamborghini “controls nearly every aspect of its
11 dealerships.” (Dkt.# 154 at 10) He argues that “Lamborghini gave Maghami the express
12 authority to act as its dealer” and thus “impliedly authorized the Maghami defendants to take
13 all actions necessary to carry out the express authorized acts.” (Id.) However, even
14 assuming for the sake of argument that ALA did have such a level of control over Motor
15 Sports,⁹ this fact would be irrelevant under Arizona law. The level of control that ALA may
16 or may not exert over a dealership is not the test in Arizona for determining whether an
17 “agency by implication” exists. “Agency by implication” requires evidence that a principal
18 intended to create an agency relationship. Phoenix Western Holding Corp. v. Gleeson, 500
19 P.2d 320, 326 (App. 1972). Colson failed to point to any act or statement by ALA that would
20 suggest that it intended to create an agency relationship. As mentioned above, the Dealer
21 Agreement explicitly disavows the existence of an agency relationship. Thus, there appears
22 to be no evidence in the record that would support a finding that there was an agency
23 relationship by implication between Motor Sports and ALA.

24 **3. Agency by Ratification**

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26
27 ⁹ ALA disputes that it controlled nearly every aspect of the relationship in its
28 Controverting Statement of Facts (Dkt.#161 ¶¶107-35).

1 ALA argues that the record lacks any evidence to suggest that any Lamborghini
2 company ratified Motor Sports' actions. (Dkt.#145) ALA asserts that no Lamborghini
3 company ever affirmed Motor Sports' conduct or received any benefit from Motor Sports'
4 fraud. (Id.)

5 For agency by ratification to exist, there must be evidence that an alleged principal
6 had knowledge of material facts related to an act by a person claiming to be its agent and
7 accepted benefits of the unauthorized act. Phoenix Western Holding Corp., 500 P.2d at 326-
8 27. Colson argues that because ALA failed to notify Colson that the Reventon would not be
9 delivered after being told by both Colson and the Maghami Defendants that the Maghami
10 Defendants sold the car to Plaintiff, ALA effectively "ratified" the sale. (Dkt.#154 at 11)
11 However, Colson has failed to identify any benefit of the authorized act that ALA accepted
12 or any act by ALA that "affirmed" Motor Sports' conduct. (Id.) Thus, even assuming ALA
13 did have knowledge of the material facts (something that is questionable, given the lack of
14 evidence regarding its knowledge of the fraudulent scheme discussed in the "aiding and
15 abetting" section above), there would not be a sufficient evidentiary basis to support a
16 finding of agency by ratification.

17 **4. Apparent Agency/ Agency by Estoppel**

18 ALA argues that the record lacks evidence to support a finding of apparent agency.
19 (Dkt.#145 at 14) While ALA admits that the record does establish that Motor Sports was an
20 authorized Lamborghini dealer who displayed Lamborghini brand signs, it points to Arizona
21 cases holding that an apparent agency cannot be established merely by showing that a motor
22 vehicle dealer is an authorized dealer who displays brand signage. (Id.) (citing Am. Motor
23 Sales Corp. v. Sup. Ct., 494 P.2d 394, 396 (App. 1972) (automobile dealer agreements,
24 advertising and stationary not indicia of agency); see also Ocana v. Ford Motor Co., 992 So.
25 2d 319, 326-27 (Fl. App. 2008) (permitting dealer to "hold himself out" as authorized dealer,
26 displaying Ford logos and other advertising, providing warranty, and training personnel
27 insufficient to establish agency)). ALA argues that the record lacks any other facts upon
28 which an agency relationship could be established. (Dkt.#145 at 14) It further points out that

1 Colson “candidly admitted during his deposition that nobody from ALSPA or ALA or
2 Motorsports ever told him that Motorsports was an agent for the manufacturer.” (Id.)

3 Colson argues that “[a] principal may be estopped to deny the agent’s authority where
4 he has allowed others to detrimentally rely on the apparent authority of the agent.”
5 (Dkt.#154 at 10) (quoting Gertz v. Selin, 112 Ariz. 562, 564 (Ariz. 1976)). Colson asserts
6 that “Lamborghini led [P]laintiff to believe that the Maghami defendants were its agents and
7 authorized to act on its behalf by authorizing them to be a Lamborghini dealer,” and that he
8 would not have done business with the Maghami Defendants but for their status as a
9 Lamborghini dealer. (Dkt. #154 at 10).

10 However, to prove apparent agency/ agency by estoppel, Colson must point to conduct
11 by Lamborghini that Colson reasonably could have relied upon to infer the existence of an
12 agency relationship. State Farm, 2006 WL 44376 at *17. Colson’s reliance on the
13 Lamborghini brand signage as a means of establishing apparent agency/agency by estoppel
14 fails to account for the Arizona cases holding that a franchisor’s corporate identity does not
15 provide a basis for a finding of apparent agency. In addition to the Am Motor Sales case
16 cited above, Seekings v. Jimmy GMC of Tucson, Inc., 131 Ariz. 1 (App. 1981), also held that
17 an automobile manufacturer was not liable to a dealership’s customer under an agency theory
18 because the sale of a vehicle was an ordinary retail transaction and the manufacturer was not
19 a party to the transaction. Colson has failed to point to any other action by ALA that would
20 create an apparent agency/agency by estoppel.

21 Given that Colson’s failure to support his theory of ALA’s vicarious liability based
22 on an agency relationship with Motor Sports for Counts One through Six of the Amended
23 Complaint (Dkt. #123), summary judgment is hereby granted in favor of ALA on these
24 claims.

25 **D. Timing of ALA’s agreement with ALSPA**

26 Finally, ALA argues that it cannot be liable for the conduct alleged in the Amended
27 Complaint because it did not assume the U.S. Lamborghini Dealer Agreement from its
28

1 predecessor-in-interest, ALSPA, and did not become the “franchisor” under Motorsports’
2 Lamborghini Dealer Agreement, until May 2008. (Dkt. #145 at 15)

3 Colson contends that (a) ALA assumed the contracts from SPA in July 2007 and (b)
4 ALA is independently liable for its own actions after May 2008. (Dkt. #154 at 16-17)
5 However, there appears to be a number of factual disputes regarding the timing and execution
6 of the documents, which documents governed, and when the documents would be
7 implemented. (Dkt. #146 ¶¶ 5, 49, 64) (Dkt. #153 ¶¶ 5, 49, 64) (Dkt.#161 ¶ 95).
8 Accordingly, this part of ALA’s motion for summary judgment will be denied. However,
9 this argument is an alternative basis for granting summary judgment to ALA, and does not
10 prevent the Court from granting summary judgment in favor of ALA based on the arguments
11 mentioned above.

12 **E. Summary**

13 Given that there is no evidentiary and/or legal basis to support a finding (1) that ALA
14 aided and abetted Motor Sports’ fraud, (2) that ALA committed the alleged tort of “failure
15 to warn,” or (3) that Motor Sports is an agent of ALA, making ALA vicariously liable for
16 Motor Sports’ conduct, ALA will be dismissed from this action.

17 **V. Colson’s Rule 56(f) Motion**

18 Colson requested a continuance of ALA’s summary judgment motion pursuant to
19 Federal Rule of Civil Procedure 56(f), arguing that he needed to conduct additional discovery
20 as to whether the Maghami Defendants were agents of Lamborghini and whether
21 Lamborghini aided and abetted the fraud. Specifically, Colson desired to (1) review ALA’s
22 supplemental responses to his discovery requests and (2) depose one additional witness.

23 The purpose of a Rule 56(f) motion is to ensure that parties have a reasonable
24 opportunity to prepare their case. U.S. v. Real Property Located at 414 Riverside Rd.,
25 Oakview, CA, 1994 WL 6603 at *5 (9th Cir. Dec. 9, 1993). It appears that Colson waited
26 until six weeks after ALA filed its summary judgment motion to serve ALA with a one and
27 a half page supplemental discovery letter, virtually ensuring that Colson would not receive
28 a reply in time to respond to the motion for summary judgment. Moreover, the supplemental

1 discovery request was served solely by regular U.S. Mail, rather than by email or fax, which
2 had apparently been the parties' past practice. (Dkt.#159 at 4). ALA responded to the
3 supplemental discovery in 24 hours. (Dkt.#159 at 4) Similarly, it appears that Colson did
4 not notice the additional witness's deposition until November 24, 2009, one week prior to
5 the date its response was due, notwithstanding the fact that Colson must have known that this
6 witness existed, given his prior testimony that he spoke with the witness at the dealership on
7 September 17, 2009. (Dkt.#159 at 10)

8 Given that it appears that Colson failed to diligently pursue discovery, this request will
9 be denied. Real Property Located at 414 Riverside Rd., Oakview, CA, 1994 WL 6603 at *5
10 (denying continuance where failure to conduct discovery was due to movant's own delay);
11 Pfingston v. Ronan Eng'g Corp., 284 F.3d 999, 1005 (9th Cir. 2002) (Rule 56(f) motion
12 denied due to lack of diligence).

13 **VI. Conclusion**

14 For the reasons stated above, Colson's Motion for Partial Summary Judgment is
15 partially granted and partially denied. ALA's Motion for Summary Judgment is granted.
16 Colson's Request for a Rule 56(f) Continuance is denied.

17 **Accordingly,**

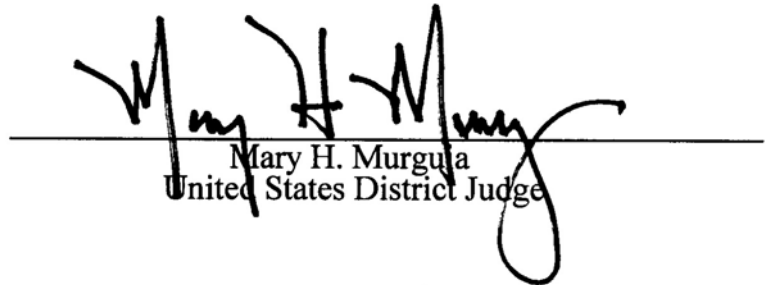
18 **IT IS HEREBY ORDERED** granting in part and denying in part Plaintiff's Motion
19 for Partial Summary Judgment (Dkt.#148). Judgment is granted against Motor Sports of
20 Scottsdale for Colson's breach of contract and unjust enrichment claims. Judgment is also
21 granted against Lamborghini of Scottsdale for Colson's unjust enrichment claim, but denied
22 as to Mr. and Mrs. Maghami and Motor Sports of Scottsdale No. 2, LLC. Judgment is denied
23 on the breach of good faith and fair dealing claim. Also, Colson's claims for
24 Misrepresentation and Fraudulent Concealment will proceed against all of the Maghami
25 Defendants except for Motor Sports of Scottsdale.

26 **IT IS FURTHER ORDERED** granting Automobili Lamborghini America, LLC's
27 Motion for Summary Judgment (Dkt.#145). Automobili Lamborghini America, LLC will
28 hereby be dismissed from this action.

1 **IT IS FURTHER ORDERED** denying Plaintiff's Request for a Continuance
2 Pursuant to Rule 56(f) (Dkt.#154).

3 DATED this 8th day of July, 2010.

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Mary H. Murgula
United States District Judge